

expressly prohibited by the Wiretap Act and is punishable by criminal prosecution and civil damages actions.

C. A Three-Year Retention Period Is More Than Adequate

The FBI proposes that carriers retain their interception records for 10 years.⁶⁴

Such a lengthy retention period is unnecessary and would serve no purpose.

AirTouch currently retains its records for three years because the statute of limitations for civil suits against carriers and their employees is two years.⁶⁵ There is no legitimate reason for carriers to retain their interception records beyond three years. If law enforcement agencies want carrier records to be retained for a longer period, they can request carriers to forward their records to law enforcement for retention.

D. An Official List of Designated Employees Is Not Necessary

The Commission seeks comment on whether it should require carriers to maintain “an official list” of all personnel designated by carriers to effectuate authorized interceptions.⁶⁶ AirTouch submits that such a list is unnecessary. Indeed, law enforcement and the industry have conducted thousands of interceptions over the past three decades without such a list.

As a general rule, interceptions are authorized and implemented locally. Because carriers generally use designated employees, these employees develop a working relationship with most law enforcement officials involved in interceptions, rendering unnecessary the need to

⁶⁴ See Proposed Rule 64.1704(b). See also *CALEA NPRM* at ¶ 32.

⁶⁵ See 18 U.S.C. § 2520(e).

⁶⁶ See *CALEA NPRM* at ¶ 33.

establish a new official list.⁶⁷ Moreover, it would be unnecessarily time-consuming for a carrier like AirTouch, with dozens of network locations throughout the country, to attempt to establish (and keep current) a list of all designated employees.

E. Competitive Carriers Should Be Permitted to Certify CALEA Compliance

The Commission proposes that “each telecommunications carrier” with annual revenues in excess of \$100 million be required to submit for Commission review their internal policies and procedures, while a carrier with annual revenues below \$100 million may certify that its policies and procedures comply with CALEA and Commission implementing regulations.⁶⁸ While a \$100 million (\$109 million adjusted for inflation) threshold may be a “reasonable demarcation point” for incumbent LECs,⁶⁹ it is not an appropriate benchmark for CMRS providers which operate in competitive markets.

All competitive carriers should have the flexibility to take advantage of the self-certification procedures. Streamlined procedures promote the public interest because they reduce administrative burden and expense and thereby increase efficiency. Moreover, it is not clear how competition would be enhanced if market participants were required to divulge their

⁶⁷ Because of this working relationship, local law enforcement personnel and designated employees advise each other of personnel changes. In the rare instance when law enforcement agencies do not know the identity of a carrier’s designated employees, they can (and do) obtain the needed information by a simple call to the carrier’s local offices.

⁶⁸ See Proposed Rule 64.1705. See also *CALEA NPRM* at ¶¶ 35-36. It is not apparent why any carrier would be interested in pursuing the third alternative — “fil[ing] a statement describing its security policies” (*id.* at ¶ 35) — as this option would require more work and entail more expense than simply submitting the policy itself.

⁶⁹ *CALEA NPRM* at ¶ 36.

internal policies and practices. Nor is it clear why the Commission would want to be placed in the difficult position of micro-managing the internal policies of carriers.

Importantly, the Commission has utilized self-certification in other contexts with considerable success. For example, for the past decade the Commission has permitted CMRS providers to certify that certain transmitting facilities comply with its radio frequency emissions rules designed to protect public health and safety, the Commission determining that self-certification was appropriate because rule violations could be punished through forfeitures.⁷⁰ In contrast, with respect to interceptions, carriers are not only subject to the Commission's forfeiture authority, but they and their employees are also subject to criminal prosecution and civil damages actions.⁷¹ Especially given the carrier industry's has a long history of meeting law enforcement's interception requirements without invading customers' substantial privacy interests, there is no reason to now require competitive carriers to submit their internal compliance manuals to the Commission for review and approval.

III. There Is No Need for the Commission to Interpret the Wiretap Act

The FBI apparently has asked the Commission to interpret and apply the criminal and civil liability provisions of the 1968 Wiretap Act.⁷² The Commission therefore seeks comment on two questions:

1. Whether a carrier may be held vicariously liable under sections 2511 and 2520 of the Wiretap Act if one of its employees is convicted of intercepting communications illegally; and

⁷⁰ See 47 C.F.R. § 1.1307.

⁷¹ See 18 U.S.C. §§ 2511 and 2520.

⁷² See *CALEA NPRM* at ¶ 24 and n.90.

2. Whether a Commission rule requiring carriers to report all illegal interceptions would modify or mitigate a carrier's liability under sections 2511 and 2520.⁷³

The Commission is undeniably qualified to interpret the Communications Act, and courts generally invoke the doctrine of primary jurisdiction to refer to the Commission issues involving an interpretation of the Communications Act. In contrast, the Commission's expertise to interpret provisions of the Wiretap Act contained in Title 18 of the *U.S. Code* is not apparent, especially when the provisions in question were enacted nearly 30 years ago and a body of interpretative case law already exists. With the many other CALEA implementation issues in need of resolution which squarely fall within the jurisdiction of the Commission, coupled with the fact that courts would be under no obligation to follow the Commission's interpretation of the 1968 Wiretap Act in any event, AirTouch recommends that the Commission decline the FBI's recommendation that it opine on the applicability and scope of sections 2511 and 2520 of the Wiretap Act.

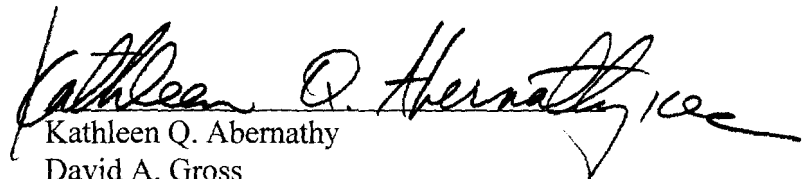
⁷³ See CALEA NPRM at ¶ 27.

CONCLUSION

For the reasons discussed herein, the Commission should: (a) address the standards and compliance deadline issues raised by the CTIA petition; (b) recognize that unique implementation issues are raised by mobile satellite and paging systems; (c) re-evaluate and revise the additional compliance and recordkeeping requirements proposed for competitive carriers; and (d) decline the FBI's invitation to interpret the 1968 Wiretap Act.

Respectfully submitted,

AIRTOUCH COMMUNICATIONS, INC.

A handwritten signature in black ink, appearing to read "Kathleen Q. Abernathy", is written over a horizontal line.

Kathleen Q. Abernathy
David A. Gross
Donna L. Bethea
AirTouch Communications, Inc.
1818 N Street, N.W.
Washington, D.C. 20036
(202) 293-3800

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